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United States v Atlantic Research Corp.: Who Should Pay to Clean Up Inactive Hazardous Waste Sites?

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It has been almost 30 years since Congress passed the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or the Superfund Law) and the Supreme Court is now engaged in a major reexamination of the basics of Superfund liability. This reexamination began with Cooper Industries, Inc. v. Aviall Services, Inc. ("Aviall"), in which the Supreme Court held that a potentially responsible party at a Superfund site, who voluntarily cleaned up the site, did not have a contribution claim against the person who caused the contamination. This decision surprised most experts because encouraging remediation and requiring those who caused the contamination to pay for the cleanup were among the major underpinnings of Superfund liability. The decision also created a significant amount of confusion regarding the relationship between the Superfund Law’s contribution provision (§ 113) and the Superfund Law’s primary liability provision (§ 107).

Federal courts quickly developed a number of responses to the Aviall decision, and within three years, there was a split in the federal circuits regarding whether, in light of Aviall, ...
§ 107(a) should be interpreted to provide a cause of action for claims by potentially responsible parties who voluntarily remediate Superfund sites. In United States v. Atlantic Research Corp. ("Atlantic Research"),
the Supreme Court resolved the split in the circuits and approved the volunteer’s right to bring a cost recovery action against a person who caused the contamination.

This article will analyze the Atlantic Research decision and argue that, while on its face, the Atlantic Research decision appears to correct the problems created by Aviall, Atlantic Research is really a logical consequence of Aviall, and together the two decisions suggest a fundamental change in how liability at inactive hazardous waste sites should be addressed. This article will then examine the likely consequences of that change in direction.

I. Background

Congress passed the Superfund Law to address the problem of “chemical poisons” in the environment. The Resource Conservation and Recovery Act (RCRA), passed by Congress in 1976, regulated the generation and disposal of hazardous wastes. It did not, however, address liability for hazardous wastes that were released or disposed of prior to the passage of RCRA. These “inactive” hazardous waste sites were seen as a major public health risk and in the Superfund Law, Congress created a liability scheme for the remediation of these sites.

A. Section 107(a)

Section 107(a), the primary Superfund liability provision, begins by listing four parties

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8 127 S. Ct. 2331 (June 11, 2007).


10 42 U.S.C. 6901–6992k.
who may be held liable: (1) the current owner or operator of the facility; 12 (2) the owner or
operator of the facility at the time of the disposal of hazardous substances; 13 (3) a person who
arranged for disposal of hazardous substances “owned or possessed by such person”; 14 and (4) a
person who transported waste to the facility, if that person chose the facility. 15 These four parties
are commonly referred to as potentially responsible parties or PRPs. Courts have interpreted §
107(a) broadly in accordance with two main policy goals: (a) to facilitate prompt cleanup of
inactive hazardous waste sites and (b) to impose liability for the costs of cleanup on those who
contributed to the presence of the waste. 16

In addition to listing the liable parties, § 107(a) defines what costs these parties may be
liable for and to whom. Section 107 (a)(4)(A) provides that the above listed parties “shall be
liable for all costs of removal or remedial action incurred by the United States Government or a
State.” Section 107(a)(4)(B) provides that the same parties shall be liable for “any other
necessary costs of response incurred by any other person.” Because “response” is defined in the
statute to include “remove, removal, remedy and remedial action,” the “costs of response” that
a private party can recover under § 107(a)(4)(B) are the same as the “costs of removal or
remedial action” the government can recover under § 107(a)(4)(A).

12 Id. at (a)(1) (provides, in relevant part: “Notwithstanding any other provision or rule of law, and subject only to
the defenses set forth in subsection (b) of this section – (1) the owner and operator of a vessel or a facility . . . shall be liable”).
13 Id. at (a)(2) (provides, “any person who at the time of disposal of any hazardous substance owned or operated any
facility at which such hazardous substances were disposed of”).
14 Id. at (a)(3) (provides, “any person who by contract, agreement, or otherwise arranged for disposal or treatment, or
arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by
such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or
entity and containing such hazardous substances”).
15 Id. at (a)(4) (provides, “any person who accepts or accepted any hazardous substances for transport to disposal or
treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a
threatened release which causes the incurrence of response costs, of a hazardous substance”).
16 Topol at § 1.1, note 16, citing numerous cases.
17 42 U.S.C. 9601(25) provides “The terms “respond” or “response” mean remove, removal, remedy, and remedial
action.”
Courts have interpreted § 107(a) to provide for strict joint and several liability. This can create particularly harsh results. For example, one party can be required to fund the entire remediation of a site even though that party contributed only a small portion of the waste at the site, and a person who purchased a contaminated site without knowledge of the contamination can be required to remediate the site even though the purchaser did not contribute to the contamination.

The Superfund Law as originally passed did not address the issue of suits between liable parties. Nevertheless, most courts held that one liable party could bring a claim against other liable parties. Recognizing such a claim, which some saw as a contribution claim, relieved some of the unfairness of imposing strict joint and several liability on one party or a small group of parties when others may also have § 107(a) liability at the same site.

B. SARA and § 113.

In 1986 Congress passed the Superfund Amendment and Reauthorization Act (commonly referred to as SARA). SARA included the explicit contribution provisions contained in § 113. Section 113(f)(1) provides that “any person may seek contribution from any other person who is liable or potentially liable... during or after any civil action.” Section 113(f)(3) provides a

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18 Topol at § 4.4 summed up a section on joint and several liability by stating “in a very short period of time, so many courts had adopted the Chen-Dyne position (holding that Superfund defendants are jointly and severally liable) that there was no longer a reasonable basis for disagreement concerning the application of joint and several liability,” citing United State v. Conservation Chemical, 1984 HWLR 6065 (W.D. Mo. 1984), which cited five other federal decisions for the proposition that there was no ground for difference of opinion on the issue. See also, Atlantic Research, 127 U.S. at 2339 (“We assume without deciding that § 107(a) provides for joint and several liability.”).

19 See, e.g., O’Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) (noting that joint and several liability often results in defendants paying more than their fair share); United States v. Mottolo, 695 F. Supp. 615, 629 (D.N.H. 1988) (stating that the right of contribution is necessary to reduce the harsh results that can be associated with joint and several liability).


21 42 U.S.C. 9613 (f)(1)

separate right of contribution for persons who have resolved their liability to the government.\textsuperscript{23}

The legislative history of § 113 indicates that Congress was confirming the existence of the right of contribution, not necessarily adding a new right of contribution.\textsuperscript{24}

After SARA added § 113, many courts held that a contribution claim could not be brought under § 107(a)\textsuperscript{25}. Additionally, because a defendant in an action pursuant to § 107(a) is subject to joint and several liability, and a claim between responsible parties was necessarily a claim for apportionment of liability like a contribution claim, most courts held that liable parties could not bring actions pursuant to § 107(a) or if they could, such claims would be treated as claims for contribution, not cost recovery.\textsuperscript{26}

The relationship between a private party’s § 107(a) claim and such party’s § 113 contribution claim was addressed by the Supreme Court in dicta in Key Tronic Corp. v United States.\textsuperscript{27} In Key Tronic, a private party brought a § 107(a)(4)(B) cost recovery action against another responsible party. The issue before the court was whether attorneys fees were within the definition of “response costs,”\textsuperscript{28} and the Court noted that after SARA, “the statute now authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.”\textsuperscript{29}

To understand how §§ 107 and 113 relate to each other, one needs to understand the relationship between §§ 107(a)(4)(A) and 107(a)(4)(B). The simplest way to view the

\textsuperscript{23} 42 U.S.C. 9613(f)(3)


\textsuperscript{25} See Atlantic Research, 127 S. Ct. at 2334 (stating that after SARA, “many Courts of Appeals held that §113(f) was the exclusive remedy for PRPs.”). The Court said this was based on the need to ‘direct traffic’ between §§107(a) and 113.

\textsuperscript{26} See e.g., Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1303 (9th Cir. 1997); Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998).

\textsuperscript{27} 511 U.S. 809 (1994).

\textsuperscript{28} Id. at 814–15 (noting that attorneys fees are generally not recoverable, but CERCLA includes costs of enforcement in the definition of response costs).

\textsuperscript{29} Id. at 816.
relationship between §§ 107 (a)(4)(A) and 107 (a)(4)(B) is that subsection (A) is for governmental suits for response costs and subsection (B) is for suits for response costs by other parties. 20

A second view of how the two subsections relate to each other focused on who the nongovernmental plaintiff may be. On its face “any other person” seems very broad, and prior to SARA, PRPs were permitted to bring § 107(a)(4)(B) actions against other PRPs. After SARA, with the addition of the contribution provisions of § 113, courts directing traffic between §§ 107 and 113 reinterpreted § 107(a)(4)(B), concluding that “any other party” was limited to parties who were not potentially responsible parties. 21

Where did this limitation come from? Courts read the phrase “incurred by any other person” to mean “incurred by persons other than potentially responsible parties” by reading § 107(a) as one long sentence, the subject of which is the list of potentially responsible parties. Section 107(a)(1-4) states that PRPs “shall be liable for –” and the “for” is followed by two clauses “(A) all costs of removal or remedial action incurred by the Government” and “(B) any other necessary costs of response incurred by any other person.” The “other person” in this understanding of subsection B means other than the people listed in (a)(1-4), meaning other than a potentially responsible party. 22

This reading is consistent with the way most courts understood § 107(a) prior to Aviall. That is, before Aviall, most courts held that § 113 was the sole remedy for a PRP and § 107(a) provided a remedy for the government and for others who were neither the government nor

20 Atlantic Research, 127 S. Ct. at 2334; Aviall, 543 U.S. at 169. Both Courts noted that this was the common reading of the provisions prior to the enactment of SARA.

21 See 127 S. Ct. at 2334; see also 543 U.S. at 169 (stating “the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a §107(a) action against other PRPs”)

22 The Court in Atlantic Research analyzes this reading of the statute at 2335–37.
PRPs.33 This conclusion was based in part on fear that if PRPs could use § 107(a), then § 113 would be superfluous. The Aviall Court created a situation in which there could be a §107(a) PRP v PRP claim without rendering § 113 superfluous.

C. The Aviall Decision

The Aviall Court held that a volunteer could not bring a § 113(f)(1) contribution claim because the claim was not “during or after” a civil action.34 Aviall had purchased contaminated sites from Cooper Industries and operated the sites for several years before discovering the contamination.35 Aviall notified the State regulatory agency and the State threatened to initiate an enforcement action against Aviall if Aviall did not remediate the sites.36 Aviall remediated the sites and initiated a contribution action against Cooper Industries, alleging that Cooper Industries was responsible for all or part of the remedial costs.37

The Aviall case presented the Court with a conflict between the language of CERCLA and the policies underlying it. Section 113(f)(1) provides a contribution action “during or following” a civil action.40 The language “during or following” appears to exclude contribution prior to a civil action.41 Thus, the language of the statute, on its face, favored dismissal of the volunteer’s suit.42 On the other hand, the policies underlying Superfund, to encourage cleanup of hazardous sites and to require those responsible for creating the sites to pay the costs of cleanup,

33 The Court, in Aviall, listed numerous Court of Appeals decisions holding that a PRP cannot bring a § 107(a) action.
34 Cooper Indus., Inc. v. Aviall Servs., 543 U.S. 157, 165–66 (2004) (emphasizing that Aviall’s failure to satisfy the “during or following” condition precludes it from seeking contribution under § 113(f)(1)).
35 Id. at 164.
36 Id. at 164.
37 See id. (indicating that Aviall originally asserted a cost recovery claim under CERCLA § 107(a), a separate claim for contribution under § 113(f)(1), before amending the complaint).
40 See Aviall, 543 U.S. at 165–66.
argued that a volunteer should have a right of contribution and that the party who had caused the contamination should not be able to avoid liability.\footnote{See notes 4 and 11 supra and accompanying text; see also Eve L. Pouliot, Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund), 47 SMU L. Rev. 607, 618 (1994) (reiterating the problem of CERCLA’s contribution provision(s) in practical effect).}


Once there was an explicit right of contribution, however, courts reinterpreted §107(a) to exclude PRP suits because no statute should be read to contain two provisions that perform the same function.\footnote{See, e.g., Bedford Affiliates v. Sills, 156 F.3d 416, 423–24 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349–56 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301–06 (9th Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 & n.7 (11th Cir. 1996); United States v. Colo. & E. R.R. co., 50 F.3d 1530, 1535–36 (10th Cir. 1995); United Technologies Corp. v. Browning- Ferris Indus., 33 F.3d 96, 101–03 (1st Cir. 1994); Auko Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).}

Based on this, Aviall argued that a broad reading of the right of contribution was consistent with the way other provisions of CERCLA were being interpreted and a narrow reading of §113(f) could have a ripple effect, requiring a reexamination of other provisions.\footnote{Brief for Appellant, Aviall Services, Inc. reprinted at 2004 WL 768554 at 20–22.}

For example, a reinterpretation of §113 to limit contribution could suggest a reexamination of $
107(a) because there would no longer be two provisions providing the same function.\footnote{50}

Additionally, most courts have concluded that defendants in § 107(a) actions are subject to joint and several liability, but a PRP should not be able to collect all of its costs.\footnote{51} Thus, a reexamination of whether a PRP can bring a § 107(a) action may require a reexamination of whether all § 107(a) defendants face joint and several liability.\footnote{52} If a PRP can collect all of its costs pursuant to § 107(a) and only an equitable share of costs pursuant to § 113, why would a PRP ever choose to bring a § 113 action? These questions permitted Aviall to argue that holding that Aviall does not have a right of contribution could disrupt the Superfund status quo and could lead to other significant changes in Superfund liability.

The Court’s decision in Aviall recognized the conflict between the language and the policy and concluded that the Court must interpret the statute as written -- § 113(f) provides for contribution claims “during or after” a civil action, but not for a volunteer.\footnote{54} The Court also recognized the potential “ripple” effect on other parts of the Superfund Law\footnote{56} and expressed no opinion on the issue that would be addressed in Atlantic Research.\footnote{57}

II. The Atlantic Research Decision

Atlantic Research voluntarily remediated a site at which it was a potentially responsible party as an operator, and brought a claim against the U.S. government, the owner of the site.\footnote{58} After the Aviall decision prevented its § 113 claim from going forward, Atlantic Research


\footnote{51} See United States v. Atlantic Res. Corp., 127 S. Ct. 2331, 2338 (2007) (distinguishing when a PRP can bring a § 113(f) contribution claim as opposed to a § 107(a) claim to recover response costs).

\footnote{52} See Aviall, 543 U.S. at 165–68.

\footnote{53} Id. at 170.

\footnote{54} See id. (stating that it was “prudent to withhold judgment” on that issue because it had not been briefed).

\footnote{55} Id. at 2335.
amended its complaint to allege a § 107(a) claim. The United States moved to dismiss, arguing that § 107(a) does not allow claims by PRP’s. The District Court dismissed the action and the Court of Appeals reversed, joining the Second and Seventh Circuits in finding that a PRP who did not have a contribution claim because of Aviall, had a cause of action under § 107(a).

The Third Circuit had taken the opposite view in E.I. Dupont de Nemours & Co. v. United States. The Supreme Court affirmed, concluding that a PRP acting as a volunteer can incur costs that are recoverable under § 107(a)(4)(B). The Court’s reasoning is based largely on an analysis of §§ 107(a)(4)(A) and (a)(4)(B) of the statute and the conclusion that to read the statute any other way would render subsection (a)(4)(B) meaningless. Once the court concluded that PRPs could bring actions under both §§ 107(a) and 113(f)(1), the Court needed to explain how the various liability sections of Superfund fit together and what role each plays.

A. The Relationship Between §§ 107 and 113.

The Court began its analysis by noting that the Superfund Law contains two main liability provisions; § 107(a), which permits claims to recover remedial costs, and § 113, which permits claims for contribution. The pre-Avilal law assigned a role to each, providing that PRP’s could only bring § 113 actions and non-PRP’s could bring § 107(a) actions. The flaw in that arrangement, the Court explained, was that § 107(a) really contains two distinct liability

59 Id.
60 Id.
61 459 F.3d at 827 (8th Cir. 2006)
62 Consolidated Edison v. UGI Utilities, Inc., 423 F.3d 90 (2d Cir. 2005)
64 460 F.3d 515 (3d Cir. 2006).
65 Atlantic Research, 127 S. Ct. at 2338.
66 Id. at 2336–37.
67 Id. at 2338.
68 Id. at 2337.
69 Id. at 2337–38.
provisions and each needs to have a role. While § 107 (a)(4)(A) explicitly authorizes actions by the United States or a State, § 107 (a)(4)(B), authorizes suits “by any other person.”

If § 107(a)(4)(B) did not include PRP claims, the court explained, then the phrase “by any other person” would be rendered meaningless, because everyone who can make a claim for response costs is either the government (a § 107 (a)(4)(A) plaintiff) or a PRP (a § 113 plaintiff). Therefore, the Court needed to find a role for § 107 (a)(4)(B).

The government had argued, as many pre-Aviall courts had held, that § 107(a)(4)(B) was intended to provide a claim for “innocent” parties who are not government entities, not a claim for non-innocent PRPs. The Court rejected that argument because § 107(a) defines PRP “so broadly as to sweep in virtually all persons likely to incur cleanup costs.” Moreover, the “by any other person” language of § 107 (a)(4)(B) does not support a distinction between private parties based on whether they are PRPs and non-PRPs.

By holding that § 107 (a)(4)(B) provides a cause of action for PRP's, the Court needed to then address when a PRP may bring a § 107(a) claim and when it may (or must) bring a § 113 claim. Or, put another way, if private parties can proceed under § 107(a), why do we need § 113?

The Court answered this question by explaining that the two sections serve distinct purposes. Section 107 (a)(4)(B) permits the recovery of “necessary costs of response incurred”

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70 Id. at 2338.
72 Atlantic Research, 127 S. Ct. at 2336–37.
73 Id. at 2335–37.
74 See id. at 2338 n.6.
75 Id. at 2336–37.
76 Id. at 2336.
77 Id.
78 Id. at 2337–38.
79 Id. at 2337.
by any other person.”\textsuperscript{81} The prerequisite to an action under this provision is incurring response costs,\textsuperscript{82} which the Court said limits § 107 (a) to claims for costs “incurred in cleaning up the site.”\textsuperscript{83} The Court explained that “when a party pays to satisfy a settlement agreement, it does not incur its own costs of response.”\textsuperscript{84} Thus, a § 107(a) action is available to a volunteer who has incurred response costs (i.e., has cleaned up the property), but not to one who has “paid to satisfy a settlement agreement or a court judgment” because the party who “reimburses other parties for costs” has not incurred its own response costs.\textsuperscript{85}

Section 113 contribution, on the other hand, is the “tortfeasor’s right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share.”\textsuperscript{86} A prerequisite to a contribution action is “inequitable distribution of common liability,” which cannot occur without a finding of liability.\textsuperscript{87} Therefore, § 113 is available only to the person who has been a defendant in litigation or has otherwise reimbursed someone for response costs.\textsuperscript{88}

The Court recognized that the dividing line it is drawing between § 107(a)(4)(B) and § 113(f) claims is far from clear, and stated in a footnote “We do not suggest that §§ 107(a)(4)(B) and 113(f) have no overlap at all.”\textsuperscript{89} Specifically, the court noted that a PRP could incur expenses “following a suit,” that are neither voluntary, nor reimbursement of the costs of another party.\textsuperscript{90} The Court did not express an opinion regarding “whether these compelled costs of

\textsuperscript{81} See Atlantic Research, 127 S. Ct. at 2338.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} See id.
\textsuperscript{86} See id. at 2338 (quoting BLACK’S LAW DICTIONARY).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} See id. at n.6.
\textsuperscript{90} Id.
response are recoverable under § 113(f), § 107(a) or both. The Court cited United Technologies Corp. v. Browning-Ferris Industries, Inc., as a case which illustrates the potential overlap.


An analysis of the United Technologies case will provide a better understanding of the distinction drawn by the Atlantic Research Court because the United Technologies court provided a thorough analysis of this distinction, rejected it, and the Atlantic Research Court responded point by point to the arguments made in United Technologies. United Technologies settled an EPA cost recovery action by agreeing to reimburse EPA for costs EPA had incurred and by agreeing to perform remediation. It then brought an action against Browning Ferris, asserting claims under both §§ 107(a)(4)(B) and 113(f). Defendants moved for summary judgment alleging that the claims were barred by the three year statute of limitations for contribution claims. United Technologies argued that the claim was not time barred because it was instituted within the six year limitations period for cost recovery claims. The court, thus, needed to determine whether the claim was a cost recovery claim under section 107(a)(4)(B) or a contribution claim under § 113(f).

The court began its analysis by noting that § 113(g)(2) provides a six year limitations period for § 107(a) cost recovery actions and § 113(g)(3) provides a three year limitations period for § 113 contribution claims. demonstrating Congress’ intent that §§ 107(a)(4)(B) and 113(f) create distinct causes of action. If they are distinct causes of action, the court reasoned, they

91 Id.
92 33 F.3d 96 (1st Cir. 1994).
93 United Techs, 33 F.3d at 97.
94 Id. at 97–98.
95 Id. at 98.
96 See id. at 101.
97 Id. at 98.
98 Id. at 98–99.
must arise in different circumstances. The court rejected the idea that a plaintiff could proceed under both sections as “untenable” because if a plaintiff could proceed under both sections, no one would choose section 113 and that would “completely swallow section [113(g)(3)’s] three year statute of limitations.”

United Technologies argued that the dividing line between the two provisions was similar to the dividing line described by the Atlantic Research Court. It argued that §107(a)(4)(B) was for the recovery of what it termed “first instance costs,” meaning costs incurred remediating the site. Section 113(f), would then be limited to the costs of reimbursing someone else for money spent remediating the site. The First Circuit rejected this distinction, reasoning that such a distinction would unreasonably limit the scope of the phrase “any other costs” in §107(a)(4)(B). The court explained that such a distinction would treat the phrase “any other costs” as if it stated “any other costs, except for monies paid to reimburse government entities’ cleanup costs” and there is “simply no rhyme or reason for reading that condition into what appears on its face to be a straightforward statutory directive.”

The First Circuit made two additional arguments against the distinction between first instance costs and reimbursement costs. First, the distinction relies on “an unusually cramped reading” of the term contribution. Second, the distinction would “emasculate the contribution protection element of CERCLA’s settlement framework.”

100 Id. at 101.
101 Id.
102 See id.; see also Atlantic Research, 127 S. Ct. at 2338.
103 See United Techs., 33 F.3d at 101.
104 See id.
105 Id. at 102.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
The Court explained that the traditional meaning of contribution is a right of “one who has discharged a common liability to recover of another also liable, the aliquot portion.” The court explained that regardless of whether a party has remediated a site at which several parties are liable or reimbursed the government for its remediation, such person has discharged a common duty and is seeking to recover the aliquot portion. The court further noted that the legislative history of SARA indicates an intent to apply the common law definition of contribution. Thus, treating “contribution” as something that occurs only to reimburse someone after litigation, limits the term more than Congress intended.

The First Circuit’s reasoning regarding contribution protection is based on § 113(f)(2), which provides that one who settles with the government “shall not be liable for claims of contribution regarding matters addressed in the settlement.” This provision encourages settlement by allowing one to settle and buy total peace because no other party could sue the settler for contribution claiming the settler had not paid its fair share. The ability to buy contribution protection, however, is not worth much, if other responsible parties can bring a § 107(a)(4)(B) cost recovery action after settlement. Thus, the First Circuit concluded that allowing § 107(a) claims by PRPs would defeat the purpose of the contribution protection provision of SARA.

Based on the above, the First Circuit rejected the plaintiff’s arguments that the difference between §§ 107(a)(4)(B) and 113 centers on the subject matter of the claims (i.e. is the plaintiff seeking to recover remediation costs it incurred or sums that it paid to reimburse another party).

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110 Id. at 99 (citing BLACK’S LAW DICTIONARY 399 (6th ed. 1990)).
111 Id.
112 Id. at 100.
114 See United Techs., 33 F.3d at 103.
115 See id.
116 Id.
and concluded that the essential difference is in the identity of the plaintiff – 113(f) is for PRPs and § 107(a)(4)(B) is for persons who are not PRPs.\(^{117}\)

C. The Atlantic Research Court’s Response to United Technologies

The Supreme Court in Atlantic Research rejected the distinction suggested by the First Circuit and responded to each element of the First Circuit’s reasoning.\(^{117}\)

1. § 107(a) Will Swallow Up § 113(f).

The United Technologies court concluded that a PRP could not bring a § 107(a) action because if a PRP could, then no one would ever bring a claim under §113(f).\(^{118}\) The reason no one would bring a §113(f) claim is that §107(a) has both substantive and procedural advantages.\(^{119}\) Most courts impose joint and several liability under § 107(a).\(^{120}\) Section 113, on the other hand, only permits recovery of the defendant’s fair share.\(^{121}\) The different statutes of limitations also provide a reason for a plaintiff to choose § 107(a).\(^{122}\) Note that in United Technologies the plaintiff needed the longer limitations period applicable to § 107(a) claims.\(^{123}\)

The Atlantic Research Court addressed this issue by creating a dividing line between § 107(a) and § 113(f) claims that means that very few plaintiffs will have the opportunity to allege

\(^{117}\) Id.
\(^{118}\) Id. at 101–02.
\(^{121}\) See Atlantic Research, 127 S. Ct. at 2338.
\(^{122}\) See United Techs., 33 F.3d at 98 (noting the six-year statute of limitations for cost-recovery actions and the three-year statute of limitations for contribution claims).
\(^{123}\) See id. at 101.
a cause of action under both sections. The court noted that because costs incurred voluntarily will be recoverable only under § 107(a)(4)(B) and costs of reimbursement of another person pursuant to a judgment or settlement will be recoverable only under § 113(f), “neither remedy swallows the other.”

The Court also explained that the advantages of using § 107(a) may not be so significant because a PRP may not be able to avoid the equitable distribution among PRPs required by § 113(f) by choosing to impose joint and several liability under § 107(a). Even for those who may have a cause of action under both sections, a defendant in a § 107(a) action could reduce the inequity of joint and several liability by counterclaiming for contribution. Whether this reduces the inequitable distribution or eliminates it needs to be examined. The Court cited Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc. (“Con Ed”) as listing cases in which plaintiff and defendant had brought both § 107(a) and § 113(f) claims and counterclaims. It is possible that in such a case, a court would be required to make an equitable allocation.

2. Any Other Costs

The First Circuit, in United Technologies, concluded that limiting § 107(a)(4)(B) to claims by persons who have incurred “first instance” cleanup costs limits the phrase “any other costs” without any language in the statute to suggest such a limitation. The Atlantic Research Court’s response to this argument is that the statute does contain this limitation. The complete

124 See Atlantic Research, 127 S. Ct. at 2338 (demonstrating instances where a PRP may recover under § 113(f)(1), but not under § 107(a)).
125 Id.
126 Id. at 2339.
127 423 F.3d 90 (2d Cir. 2005).
128 See Atlantic Research, 127 S. Ct. at 2339; see also Consolidated Edison, 423 F.3d at 100 n.9 (citing Blasland, Bouck & Lee, Inc. v. City of N. Miami, 283 F.3d 1286, 1292 (11th Cir. 2002); Dent v. Beazer Materials & Servs., Inc., 156 F.3d 525, 527 (4th Cir. 1998); Redwing Carriers, 94 F.3d at 1495).
129 See Atlantic Research, 127 S. Ct. at 2339.
130 See United Techs., 33 F.3d at 102.
131 See Atlantic Research, 127 S. Ct. at 2338.
phrase in the statute is “any other necessary costs of response incurred by any other person.” 132

The Atlantic Research Court stated that § 107(a) “permits a PRP to recover only the costs it has incurred in cleaning up a site . . . When a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response.” 133 Thus, § 107(a)(4)(B) is limited to claims by persons who have remediated the site (first instance claims) because only these parties have “incurred” response costs. 134

This limitation is slightly different from the limitation suggested by the Second Circuit in Consolidated Edison Co. v. UGI Utilities Inc. (“Con Ed”), 135 The Second Circuit reached essentially the same conclusion as Atlantic Research, that a person who has not paid for the cleanup has not incurred response costs. 136 However, unlike the Atlantic Research Court, which concluded that such a person has not “incurred” the costs (they have merely reimbursed the person who incurred them), 137 the Con Ed court suggested that such persons have not incurred “necessary costs of response.” 138 The court cited United States v Taylor 139 for the proposition that “when a party does not conduct its own cleanup, it has not incurred recovery costs,” 140 noting that the reimbursement costs incurred by Taylor were “not costs of response.” 141

By focusing on who incurred the response costs rather than whether the costs were costs of response, the Atlantic Research Court limited the impact of the case. 142 The term “response costs” has long been viewed as including many costs that were not strictly speaking cleanup

133 Atlantic Research, 127 S. Ct. at 2338.
134 Id.
135 423 F.3d 90 (2d Cir. 2005).
136 See Consolidated Edison, 423 F.3d at 100.
137 See Atlantic Research, 127 S. Ct. at 2338.
138 Consolidated Edison, 423 F.3d at 101.
140 Consolidated Edison, 423 F.3d at 101.
141 Id. at n.13.
142 See Atlantic Research, 127 S. Ct. at 2338.
In Key Tronic, for example, the issue was whether certain litigation costs were “response costs” and the Court held that fees incurred in searching for additional PRPs were response costs, but certain attorney’s fees were not. The emphasis on who has incurred the recoverable costs, avoids redefining “response costs.”

3. Definition of Contribution

The United Technologies court rejected the distinction between first instance response costs (which do not give rise to contribution claims) and costs of reimbursement (which are the subject of contribution claims) because such a distinction relies on “an unusually cramped reading” of the term contribution. The Atlantic Research Court disagreed. The crux of the disagreement regarding the meaning of “contribution” concerns whether a judgment against the person claiming contribution is a prerequisite to a contribution claim. Both courts agree that contribution is a common law doctrine aimed at preventing or reducing the unfairness inherent in joint and several liability. It is a claim between jointly and severally liable parties for “an appropriate division of the payment one of them has been compelled to make.” Both courts also agree that in passing CERCLA, Congress intended terms such as “contribution,” that have a common law meaning, to have that evolving common law meaning. Thus, the Restatement

143 See Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir. 1989) (suggesting that recovery under CERCLA is not limited to cleanup costs).
144 See Key Tronic Corp. v. United States, 511 U.S. 809, 811, 820 (1994).
145 United Techs., 33 F.3d at 102.
146 Atlantic Research, 127 S. Ct. at 2338.
148 United Techs., 33 F.3d at 99.
The Atlantic Research Court disagreed with the United Technologies court regarding whether potentially responsible parties are joint tortfeasors. Joint tortfeasors are subject to joint and several liability. A potentially responsible party who is a § 107(a)(4)(B) plaintiff may not be subject to joint and several liability. More importantly, the Atlantic Research Court cited Aviall for the proposition that §§ 107(a) and 113(f) are “clearly distinct” remedies. If they are distinct remedies, then treating all actions between PRPs (which necessarily require apportionment among PRPs) as contribution claims “confuses the complementary, yet distinct nature of the rights” provided by the sections.

If the rights and remedies are distinct, then the difference between a § 107(a)(4)(B) plaintiff and a § 113(f) plaintiff is not merely procedural. The Eighth Circuit, in Atlantic Research, had concluded that the only difference between a § 107(a)(4)(B) plaintiff and a § 113(f) plaintiff is the parties’ “different procedural circumstances.” What the court meant is that the rights and remedies were essentially the same. The only difference is that the person who had been sued could only bring a § 113(f) claim and the person who had not been sued could not bring a § 113(f) claim could bring a § 107(a) claim.

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151 See H. French Brown, IV, Rebirth of CERCLA § 107 Contribution Actions: New Life for PRPs That Conduct Voluntary Cleanups After Aviall, 14 BUFF. ENVTL. L.J. 211, 218 (2007) (finding that many courts found the Restatement (Second) of Torts to govern actions where PRPs incurred more than their fair share of cleanup costs).
152 See RESTATEMENT (SECOND) OF TORTS: APPORTIONMENT OF HARM TO CAUSES § 433A.
153 If they are entitled to joint and several liability as the Court implied, then they cannot be subject to more than a contribution claim. See also D. Auxer, Comment, Orphan Shares: Should They Be Borne Solely by Settling PRP Conducting the Remedial Cleanup or Should They Be Allocated Among All Viable PRPs Relative to Their Equitable Share of CERCLA Liability?, 16 TEMP. ENVTL. & TECH. J. 267, 267 (1998) (stating that defendant PRPs were responsible for all cleanup costs incurred by a plaintiff PRP under the theory of joint and several liability).
154 Atlantic Research, 127 S. Ct. at 2337.
155 Id.
156 Atlantic Research, 459 F.3d at 835.
157 See id. at 836–37 (explaining the vitality of §§ 107 and 113 as available remedies).
The Atlantic Research Court disagreed with that conclusion because the two provisions provide distinct rights and remedies. The § 107(a)(4)(B) plaintiff has incurred response costs. The § 113(f) plaintiff has not incurred response costs. The statute treats those who have incurred response costs differently (as a matter of substantive rights) than the person who has not incurred response costs – and has merely reimbursed someone else for costs. Such a person is entitled to joint and several liability and has a longer statute of limitations. Thus, the conclusion that not all claims between PRPs are contribution claims is based on the conclusion that not all PRPs are joint tortfeasors. The § 107(a)(4)(B) plaintiff is a joint tortfeasor with the other PRPs only after there has been a judgment or settlement. Thus, the Atlantic Research Court concluded that a determination of liability is a requirement to a contribution claim.

This may explain why the Con Ed court refused to use the term PRP. While courts and practitioners have used the term PRP for many years, the Second Circuit took the position that after Aviall, it may not be appropriate to use the term PRP because it “may be read to confer on a party that has not been liable, a legal status that it should not bear.” The point the Second Circuit is making, is that even though two parties may, if sued, have Superfund liability, the “volunteer” who sues under § 107(a)(4)(B) has a different legal status from other PRPs and it may be confusing to use the same designation.


158 See Atlantic Research, 127 S. Ct. at 2337.
159 See Atlantic Research, 127 S. Ct. at 2338; see also Lewis A. Fleak, Case Note, Contribution to Inaction: Interpreting CERCLA to Encourage, Rather Than Discourage, Hazardous Waste Clean-Up; Dico, Inc. v. Amoco Oil Co., 11 Mo. ENVTL. L. & Pol’Y REV. 294, 300 (2004) (affirming that § 107(a) refers to persons who incurred cleanup costs).
160 See Atlantic Research, 127 S. Ct. at 2338.
161 Id.
162 See Michael V. Hernandez, Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties, 21 HARV. ENVTL. L. REV. 83, 130 (1997) (pointing out that not all claims by PRPs are for contribution).
163 See Consolidated Edison, 423 F.3d at 98 n.8.
164 See id. at 100 (recognizing that voluntary cleanup may depend on how § 107(a) is read).
The United Technologies court refused to permit PRPs to bring actions under § 107(a)(4)(B) in part because that would interfere with the contribution protection provided in § 113(f)(2). The court’s reasoning was that the government’s ability to promote settlements by offering contribution protection was an important part of SARA. Contribution protection means protection against contribution claims and not protection against cost recovery claims. Thus, recognizing a cost recovery claim for PRPs means the government cannot protect the settling parties against all future suits, which will, in turn, hinder the ability of the government to settle cases.

The Atlantic Research Court provided three responses to this problem. First, because a § 107(a)(4)(B) defendant can trigger apportionment by bringing a § 113(f) counterclaim and a court of equity will always take prior settlements into account, there is little risk to the settling party that a court will require it to pay more than its equitable share. Second, contribution protection continues to provide significant protection; it protects against all contribution claims and very few parties (i.e. only those who performed the cleanup) will have the ability to bring a § 107 claim. Third, settlement “carries the inherent benefit of finally resolving liability as to the United States or a State.” Thus, the Court believed that even though contribution protection would no longer provide absolute protection, it will provide enough protection to continue to encourage settlement.

III. The New CERCLA Framework

165 See United Techs., 33 F.3d at 101–03.
166 Id. at 102.
167 Id. at 103.
168 See id. at 102–03 (suggesting the CERCLA settlement framework would be undermined if a cost recovery claim is recognized).
169 See Atlantic Research, 127 S. Ct. at 2339.
170 Id.
171 Id.
172 Id.

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Typically, when the government identifies a site that needs to be remediated, it identifies the potentially responsible parties and gives them the opportunity to remediate the site. This opportunity can be accompanied by a number of threats, such as the threat that if the responsible parties do not remediate, the government will and the government will then initiate a cost recovery action. Many PRPs agree to remediate because the government is likely to spend more money on remediation than a private party and because there are essentially no defenses under Superfund. Thus, the refusal to clean up as a volunteer can be considerably more costly than refusing to clean up and waiting to be a cost recovery defendant.

The Aviall decision made it more difficult for parties to agree to remediate because a volunteer could not proceed against other PRP’s. This slowed down remediations and made litigation more likely. Additionally, in matters already in litigation, it provided a procedural means for responsible parties to avoid liability. This also had the effect of increasing the amount of litigation by encouraging some defendants not to settle.

The Supreme Court in Atlantic Research, has found a way to avoid the problems created by Aviall, without overturning Aviall. By providing the volunteer with a claim, the volunteer is more likely to cleanup and other PRPs have an incentive to join in. The result should be more remediation and less litigation.

One area in which Atlantic Research could have the effect of increasing litigation concerns the new definition of “response costs.” There are significant advantages to being a section 107 plaintiff and perhaps greater advantages to being a section 113 defendant. Potential plaintiffs will have a great incentive to structure their dealings with the government to permit a section 107 claim. This could increase
Pre-Aviall: (1) § 107(a)(4)(B) was only for suits by non-government parties who were not PRPs; 173 (2) All PRPs were viewed as joint tortfeasors so that a PRP who performed remediation was not treated significantly differently from a PRP who reimbursed someone else for performing remediation; 175 (3) All PRP versus PRP claims were § 113 claims, 176 which are subject to equitable apportionment; 177 and (4) EPA, in a settlement, could provide protection against all future claims arising out of the site. 178 Now, each of those statements is either not true or subject to significant question.

A. Performing Remediation v Reimbursing

Chief among the changes made by the Atlantic Research Court, and the catalyst for some of the other changes is the distinction between performing remediation and reimbursing others. 179 Section 107 is only available to the person who has performed remediation because only that person has “incurred” response costs. 180 Why did the Court read this distinction into the statute when most prior courts had not?

The Court rejected the pre-Aviall reading of § 107(a)(4)(B) for two reasons. First, courts had read into § 107(a)(4)(B) a distinction between PRPs and others, that cannot be found in the

173 See notes 31 through 33 supra and accompanying text.
175 See notes 68-74 supra and accompanying texts. See also, United Technologies, 33 F.3d at 100.
176 See Ronald G. Aronovsky, Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes, 33 ECOLOGY L.Q. 1, 29 (2006) (observing that a claim by one PRP against another PRP was necessarily one for contribution).
177 See notes 113-116 supra and accompanying text. See also, Craig N. Johnston, Supreme Court Review: United States v. Atlantic Research Corp.: The Supreme Court Restores Voluntary Cleanups Under CERCLA, 22 J. ENVTL. L. & LITIG. 313, 325 (2007) (emphasizing that the settlement bar continues to provide protection from subsequent suits by PRPs).
178 See Atlantic Research, 127 S. Ct. at 2338.
179 Id.
language of the statute. Second, by distinguishing between PRPs and others who were not PRPs, courts had interpreted § 107(a)(4)(B) in a manner that rendered it useless.

The Court, however, went beyond simply reasoning that § 107(a)(4)(B) needs to be reinterpreted because the meaning prior courts attributed to it rendered it useless. The Court made the affirmative decision that just as the simple meaning of the section rejects the distinction made by so many earlier courts, the simple meaning of the section requires the distinction it is drawing -- section 107(a)(4)(B) provides a cause of action only for persons who have “incurred response costs” and not for persons who have reimbursed others for response costs.

The Con Ed court read the section similarly, i.e., § 107(a)(4)(B) applies only to those who “incurred response costs,” not those who reimburse others. The Con Ed court, however, had a slightly different emphasis and this difference goes to the heart of understanding the difference between the § 107(a)(4)(B) plaintiff and the person who merely reimbursed others.

According to the Con Ed court, the difference between the remediate and the reimburser is whether the costs they incurred were “response costs,” while the Atlantic Research Court concluded that the difference is who has “incurred” the response costs. The position taken by the Atlantic Research Court maintains the broad definition of “response costs” used by prior

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181 See id. at 2336 (dismissing the interpretation of § 107(a)(4)(B) as distinguishing between PRPs and nonPRPs); see also Consolidated Edison, 423 F.3d at 99–100; United Techs., 33 F.3d at 100.
182 See id. at 2337 (acceptance of the distinction between PRPs and nonPRPs would render § 107(a)(4)(B) useless because there are no nonPRPs who would incur response costs); see also H. French Brown, IV, Rebirth of CERCLA § 107 Contribution Actions: New Life for PRPs That Conduct Voluntary Cleanups After Aviall, 14 BUFF. ENVTL. L.J. 211, 232–33 (2007) (referencing cases that found no basis for the distinction).
183 Id. at 2338.
184 Id. at 2334.
185 See Consolidated Edison, 423 F.3d at 100.
186 See id. at 96 n.6 (discussing the meaning of “response” as used in the statute).
187 See Atlantic Research, 127 S. Ct. at 2338.
courts and thus, maintains an expansive reading of what the § 107(a)(4)(B) plaintiff may recover once we decide who may be a § 107(a)(4)(B) plaintiff.188

The difference between Con Ed and Atlantic Research in this regard is subtle. When asked who may recover under § 107(a)(4)(B) and what costs may they recover, the Con Ed court answered (i) “any other party” but (ii) only for response costs (which excludes reimbursement costs).189 On the other hand, the Atlantic Research Court answered the same questions: (i) only persons who incurred response costs (which excludes persons who reimbursed someone who incurred response costs) and (ii) they can recover response costs (which term retains its original meaning).190

For the reasons described below, the Atlantic Research Court’s reading of § 107(a)(4)(B) is more consistent with other CERCLA provisions, shows a better understanding of the practical reality regarding who is a “volunteer” and helps explain how the Court would respond when faced with the overlap case that it left open.

B. The Overlap

The Court noted that the line between the volunteer remediator, who has a § 107(a)(4)(B) claim, and the reimbursor, who has only a § 113 contribution claim, is not so clear and there could be an overlap; a person who has performed remediation and therefore should have a § 107(a)(4)(B) claim, but who is not a volunteer and therefore has a § 113 contribution claim.191 The Court declined to decide how such overlap cases should be treated.192

188 See id.
189 See Consolidated Edison, 423 F.3d at 99 (focusing the issue on whether Con Ed is a “person” and whether it incurred “response costs”).
190 See Atlantic Research, 127 S. Ct. at 2338.
191 Id. at 2338 n.6.
192 Id.
The Court’s reasoning suggests that the remediator who is not a volunteer should have a cause of action under both provisions. Nothing in the Court’s interpretation of § 107(a) indicates that only volunteers may have a § 107 cause of action; the key is incurring response costs.\textsuperscript{193}

Indeed, nothing in § 107 or in the Court’s interpretation of § 107 indicates that being a volunteer is relevant.\textsuperscript{194} The language does, however, limit recovery under § 107 to “response costs incurred by such person.”\textsuperscript{195} Thus, in the overlap case, the plaintiff should have a § 107 claim for the money spent cleaning up the property. The plaintiff should also have a § 113 contribution claim for the money spent reimbursing someone else because the litigation that prevents him from being a volunteer triggers a contribution claim. For example, if one settled litigation by agreeing to spend $100,000 on remediation costs and reimbursing the government $500,000 for its costs, plaintiff should have a § 107 cause of action for the $100,000 and only a contribution claim for the $500,000.

The Court’s reasoning so strongly suggests that the overlap plaintiff should have both causes of action that we need to examine why the Court declined to decide this issue. One reason for declining to decide is that the Court’s holding was that a volunteer who remediates has § 107 (a) claim.\textsuperscript{196} The Court was not faced with the case in which the plaintiff, who remediates, was not a volunteer and that issue had not been briefed.\textsuperscript{197}

A second reason could be the Court’s recognition that in reinterpreting § 107 (a)(4)(B), the Court was responding to an issue created by the Aviall decision, which held that a volunteer did not have a § 113(f)(1) claim.\textsuperscript{198} Whether one was a volunteer or a defendant in a civil action

\textsuperscript{193} See Atlantic Research, 127 S. Ct. at 2338.


\textsuperscript{196} Id. at 2338.

\textsuperscript{197} Id. at 2338 n.6.

\textsuperscript{198} Id. at 2334, noting that the Aviall decision had “caused several Courts of Appeals to reconsider whether PRPs have rights under § 107(a)(4)(B).”
is key to determining who has a § 113(f)(1) claim. Thus, there is some ground to suggest that being a volunteer would be important in determining who has a § 107(a) claim. Whether being a volunteer is important in interpreting § 107(a)(4)(B) is addressed below in section C.

Another reason for the Court not deciding this issue relates to the contribution counterclaim and the joint and several liability issues raised by that counterclaim. The joint and several liability issue is discussed below in section D.

C. Volunteer v Forced Remediator

The difference between the way the Atlantic Research Court and the Con Ed court read the phrase “costs of response incurred by any other person” shows how the court’s differed on the issue of whether being a volunteer is important. According to the Atlantic Research Court, the person who has a § 107(a)(4)(B) claim is the person who performed remediation because only the person who has performed remediation has “incurred” response costs. The Court’s reasoning does not suggest that whether this person was a volunteer has any relevance to whether the person has incurred response costs.

The Con Ed court, on the other hand, explained that its understanding of the term “response costs” is based in part on what the person spending the money is responsible to. If a

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199 The holding in Aviall was that in order to have a 113(f)(1) claim one must have been a defendant in a 106 or 107 action. See Jeannette Paull, Neither Innocent Nor Proven Guilty: The Aviall Services v. Cooper Industries Dilemma, 13 BUFF. ENVTL. L.J. 31, 48 (2005) (recognizing the dilemma between those that can and cannot sue under § 113(f)(1)).


201 See Atlantic Research, 127 S. Ct. at 2338 (stating that, under § 107, PRPs are permitted to recover costs they incurred in a site cleanup).

202 See Consolidated Edison, 423 F.3d at 100 (holding that to recover response costs, it must not be done pursuant to a court order or judgment).
That person has, therefore, incurred *response* costs. On the other hand, a person who merely reimburses someone else due to litigation or threat of litigation has only a contribution claim because that person is responding to the litigation or threat of litigation, not to the release of hazardous substances. According to this reasoning, only a volunteer can incur response costs. Thus, if the Atlantic Research Court agreed with this interpretation, it would not have any question about the overlap case. The forced remediator would not have a § 107 claim.

The difference between the courts regarding the importance of being a “volunteer” can also be seen in their policy discussions. The Con Ed court quoted extensively from statements in the legislative history of CERCLA about the importance of being a volunteer. The Atlantic Research decision contains none of that policy discussion and does not cite to that discussion in Con Ed. The Atlantic Research Court, in not discussing the importance of being a volunteer, shows a greater understanding of the practical realities because it recognizes that, to a large extent, there are no volunteers. There are very few parties who will spend significant sums of money to clean up someone else’s mess without any compensation. Aviall, Con Ed, and Atlantic Research were all threatened with enforcement action and “volunteered” rather than engage in litigation that they could not win. They were, therefore, not responding to the release of hazardous substances as much as they were responding to the threat of enforcement action.

211 See id. at 99 (finding that Con Ed incurred response costs when remediating the plant sites).
212 See id. (adding that the costs Con Ed incurred was not a result of an order or judgment).
213 See id. at 100.
214 See id. at 94 (stating that the goals of CERCLA are to impose liability on responsible parties “and inducing those persons “voluntarily” to pursue appropriate environmental response actions”).
215 See Aviall, 543 U.S. at 168.
If the Con Ed “volunteer” was not responding to the release, but was, instead responding to the potential liability, then the Con Ed court’s reasoning, based on what the person is responding to, does not fit the realities of the case. The volunteer in Aviall, and accordingly, in § 113(f)(1), is a person who has not been subject to a civil action. The Con Ed volunteer, on the other hand, is responding to the release of hazardous substances because he is not responding to a civil action.

The Atlantic Research Court rejected that reasoning. It accepted the Aviall definition of volunteer for the purposes of § 113. That definition, however, does not transplant to § 107(a)(4)(B) because, as a practical matter, that person is responding to the threat of liability and not to the release of a hazardous substance and, § 107(a)(4)(B) provides a cause of action for the person who incurred response costs (i.e. the remediator) without any indication that the person’s motivation is relevant.

The Atlantic Research Court made clear that it believed there are no true volunteers when it stated that “if PRPs do not qualify as “any other person” for purposes of § 107(a)(4)(B), it is unclear what private party would . . . accepting the Government’s interpretation would reduce the number of potential plaintiffs to almost zero.” The government’s interpretation of § 107(a)(4)(B) was dependent on the existence of true volunteers, non PRPs who remediate a

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218 See Consolidated Edison, 423 F.3d at 94.
219 See id. at 2338 (giving no regard to a party’s motivation).
220 See Atlantic Research, 127 S. Ct. at 2336 (maintaining that the definition of PRPs broadly sweeps all persons likely to incur cleanup costs).
221 Id., at 2336–37. The Court noted that Congress had exempted some bona fide purchasers and the government claimed that these parties could be innocent plaintiffs. However, even if the exemption did create some potential plaintiffs, the government’s interpretation of the statute required one to accept the proposition that a statute enacted in 1980 was meaningless until the passage of an exemption in 2002.
site and seek contribution. The Atlantic Research Court took the position that either such people do not exist or there are so few of them, that their presence is not sufficient to warrant

recognition in interpreting the statute.\textsuperscript{227}

Thus, while the Con Ed court believed that it was important to encourage voluntary cleanup,\textsuperscript{228} the Atlantic Research Court recognized that in reality there are no true volunteers and those who the Con Ed court viewed as volunteers do not need a cause of action against other PRPs as an economic incentive to remediate because the potential liability faced by such PRPs already gives them sufficient incentive to remediate.

\textbf{From a policy perspective, the Atlantic Research Court’s} distinction between reimbursers and remediators upholds a position that EPA had been trumpeting. The government’s brief in Atlantic Research argued that CERCLA was never intended to promote voluntary cleanup.\textsuperscript{229} The goal, according to the government, is “to promote government-supervised cleanups and to encourage PRPs to promptly settle their liability.”\textsuperscript{230} Indeed, the government is critical of the Con Ed court’s discussion of encouraging voluntary cleanups because Congress did not intend “to promote unsupervised cleanups at the expense of government-supervised cleanups.”\textsuperscript{231}

The Atlantic Research Court seems to have accepted the government’s position by adopting a distinction between remediators and reimbursers that leaves no room in the Court’s plain reading of the statute for the volunteer. That is, §107(a) contains advantages not provided by §113. Once it is given that some PRPs are to have these advantages and others are not, the

\begin{itemize}
  \item \textsuperscript{227} See id. at 2336 (stating the uncertainty as to what private party would fall under “any other person,” if PRPs did not).
  \item \textsuperscript{228} See the court’s policy discussion at 324 F.3d 94 and the discussion at 100, where the court notes that “we would be impermissibly discouraging voluntary cleanup were we to read section 107(a) to preclude parties that, if sued, would be held liable . . . from recovering necessary response costs.”
  \item \textsuperscript{229} The brief can be found at 2007 WL 669263, paged 21-23.
  \item \textsuperscript{230} Id. at 21.
  \item \textsuperscript{231} Id. at 23. The government interprets all of the references to encouraging voluntary cleanups in CERCLA’s legislative history be mean by settlement with the government “rather than voluntary, unsupervised, sua sponte cleanup.”
\end{itemize}
Court needed to explain which PRPs are to have those advantages – volunteers or all remediators. The Court’s explanation of § 107(a)(4)(B) indicated that the statute gave those advantages to all remediators.

Two additional CERCLA provisions provide support for the Atlantic Research Court’s interpretation of § 107(a)(4)(B) – the statute of limitations triggers and the NCP requirement. The statute of limitations for a § 107 claim is “3 years after completion of the removal action” or “6 years after the initiation of physical on-site construction of the remedial action.” In both cases, the statute of limitations is triggered by remedial activity, not by reimbursing someone.

The statute of limitations for a § 113 contribution claim is 3 years after “the date of a judgment . . . or the date of an administrative order . . . or entry of a judicially approved settlement with respect to response costs.” The trigger is a judgment or settlement, not remediation. This fits in well with the Court’s distinction between the remediator, who has a § 107(a) cause of action and the reimbursor, who has a § 113 claim. It also supports the conclusion that being a volunteer is relevant to whether one has a § 113 claim (because the statute of limitations is only triggered if one reimburse as a result of litigation or settlement, thus excluding the volunteer), but it is not relevant to the § 107(a) claim because the statute of limitations is triggered by remediation without regard to why one remediated.

The different statute of limitations triggers also help explain why the overlap case should provide a cause of action under both provisions. For the nonvolunteer remediator, there has been litigation or a settlement triggering a § 113(f)(1) claim and he has performed remedial activity, triggering a § 107 claim.

The Court could have also used the National Contingency Plan (“NCP”) requirement to support its conclusion that the key to identifying who may sue under § 107 is performing remediation. In both §§ 107(a)(4)(A) and (B) response costs are recoverable only if there are incurred in a manner that is consistent with (or not inconsistent with) the NCP. The NCP is EPA’s codification of “procedures and standards for responding to releases of hazardous substances, pollutants and contaminants.” The only costs that it makes any sense to refer to as consistent with the NCP are remediation costs. Therefore, only remediation costs are recoverable under § 107(a)(4)(B) and conversely, anyone who merely reimburses another party has not incurred costs that in a manner that is consistent with the NCP and has no claim under § 107.

D. Contribution, Joint Tortfeasor Status and Joint and Several Liability

The Court’s uncertainty regarding the overlap case could also relate to uncertainty regarding whether a PRP who has a § 107(a) claim is entitled to joint and several liability. The Court stated that it assumes without deciding, that a § 107(a) plaintiff is entitled to joint and several liability. However, in the overlap case, where the forced remediator has a cause of action under both provisions and there is a contribution counterclaim, the Court was uncertain regarding whether the contribution counterclaim would turn everything into a contribution claim in which each party pays its fair share, or the § 107(a) claim with joint and several liability would still provide some advantage for the remediator.

Let’s examine a simple example. Assume there are four parties, each of whom contributed equal quantities of the same waste to the site. Equitable apportionment is likely to

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234 42 U.S.C. 9607 (2007). A difference between (a)(4)(A) and (A)(4)(B) is that in (a)(4)(A) the government may collect costs that are incurred in a manner that is “not inconsistent with” the NCP, while in (a)(4)(B) the private party can collect only if the costs are incurred in a manner that is “consistent with” the NCP.

assign 25% shares to each party. However, where one party has remediated the site and therefore has a § 107(a) claim, that party may be entitled to joint and several liability, in which case, the other three parties would all pay 1/3 and the remediator will recover all of its costs.

A number of courts have suggested that it is unfair to permit a PRP to recover all of its costs. The PRP is, after all, responsible for part of the problem. In Raytheon Aircraft Co. v United States, for example the court addressed the issue of whether a PRP who has a cause of action under § 107(a) should be able to collect all of its costs. The court concluded, based on Atlantic Research, that a PRP who is a § 107(a) plaintiff should be entitled to joint and several liability. The court then addressed the contribution counterclaim. The court reasoned that such a counterclaim is not precluded and a court may apply equitable considerations to impose some burden on the plaintiff. A New York court reached the same conclusion in In Re Dana.

Why does the contribution counterclaim not defeat joint and several liability? That is, in the above example, the contribution counterclaim could impose 25% of the costs on the plaintiff and the plaintiff could be left with none of the benefits of joint and several liability. The answer is twofold. First the effect of the counterclaim requires the application of equitable factors and a court of equity could treat the 25% contributor who remediated better than it treats the 25% contributor who did not remediate. The Atlantic Research Court’s reasoning suggests that it should. Second and more importantly, is the orphan share that is present in almost every Superfund case. Most Superfund sites contain contamination that occurred many years ago.

237 See Raytheon Aircraft, __ F. Supp. 2d ____, 2007 WL 4530820 at *1 (highlighting the two issues concerning claims for cost recovery and contribution).
238 See id. at *4.
There will usually be contributors to the contamination who are not before the court because they could not be located or they are out of business. When the defendants are subject to joint and several liability, they are forced to pay this orphan share.

Thus, if we take the above case where there are only four PRPs, if only three are before the Court, the remediator PRP who has joint and several liability can shift the entire orphan share to the two defendants. A fair result could thus have the plaintiff paying approximately 25% based on its equitable share and the other two PRPs sharing the other 75%. The courts in Raytheon and Dana concluded that permitting the PRP plaintiff to recover all of its costs and making the defendants pay 100% is unfair. However, by holding that such parties are entitled to joint and several liability, the courts have also concluded that not providing an advantage for the remediator is inconsistent with Atlantic Research.

The Atlantic Research Court, left this issue open, on the other hand, because there are cases where the application of joint and several liability may be unfair. For example, what if there is a very large orphan share. Let’s say there are nine contributing parties, eight of whom contributed 10% of the contamination each and one of whom contributed 20%. The 20% contributor remediates and sues the only PRP he can locate. Should a 10% contributor be stuck with 80% or 100% of the costs when a party who caused more of the problem pays significantly less? The Atlantic Research Court did not decide this issue. If we say that such a plaintiff has only a § 113 claim, the parties are on equal footing. On the other hand if the plaintiff has a § 107

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241 See Albert C. Lin, Beyond Torts: Compensating Victims of Environmental Toxic Injury, 78 S. Cal. L. Rev. 1439, 1480 (2005) (suggesting the need to use forensic techniques and models to estimate the origin and timing of contamination).

242 See Amy B. Blumenberg, Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation, 43 Hastings L.J. 661, 670 (1992) (stating the parties that are no longer in business and engaged in hazardous dumping may be out of the courts’ reach).

243 See Raytheon Aircraft, __ F. Supp.2d __, 2007 WL 4530820 at *4–5 (noticing the potential for PRP plaintiffs to fully recover their costs); see also In re Dana, 2007 WL 4205823 at *7.
claim and is entitled joint and several liability, said plaintiff should not be required to pay any of
the orphan share.

The Atlantic Research Court left open the possibilities that (1) joint and several liability
would preclude the contribution counterclaim permitting 100% recovery or (2) the contribution
counterclaim would wipe out joint and several liability. The approach suggested by the Raytheon
and Dana courts, in which both joint and several liability and the contribution counterclaim have
a role, seems to be fairer than either extreme.

What if there is no Joint and Several Liability?

To the extent that the Atlantic Research Court questioned whether a PRP plaintiff should
have joint and several liability, it permits the expansion of a divisibility argument that has been
rejected by most courts deciding Superfund actions. The Superfund Law makes no reference to
joint and several liability. Indeed, both the House and Senate versions of the bill that became the
Superfund Law contained language authorizing joint and several liability and that language was
removed shortly before passage. Nevertheless, courts have consistently applied joint and

244 The Senate amendments eliminating joint and several liability were passed on November 24, 1980. 126 Cong.
Rec. S. 14964 (Nov. 24, 1980). The House amendments eliminating joint and several liability were passed on
December 3, 1980. 126 Cong. Rec. H. 11787 (Dec. 3, 1980). These amendments are discussed by the Chem-Dyne
court at 806, quoting extensively from Senator Helms’ speech. Senator Helms explained the deletion of joint and
several liability as follows: “Retention of joint and several liability in S. 1480 received intense and well deserved
criticism.”

The court further reasoned that where a mixture of chemicals creates one problem it is difficult to determine what part of the problem is attributable to what part of the combination. Therefore, joint and several liability is appropriate.

Courts have generally applied joint and several liability in Superfund actions based on the common law of joint tortfeasors. Numerous courts have used § 433A of the Restatement (Second) of Torts to determine when to apply joint and several liability and when liability is divisible. The comments to the Restatement indicate that joint and several liability is appropriate where the actions causing the harm interact so that there is one harm that results from the combination of the events and each cause is necessary, but not sufficient, to cause the result. On the other hand, when the harms occur in sequence, each adding to the cumulative effect of the other, then the causes do not interact; each cause is sufficient to cause the problem or some identifiable part of the problem and joint and several liability is not appropriate.

This definition of joint tortfeasor – the actions interacting, does not explain why many Superfund PRPs have joint and several liability. How can an owner and one who contaminated the site be jointly and severally liable? Their actions did not interact, particularly if the owner purchased after the contamination. They are not joint tortfeasors as that term is used in the

246 The Chem-Dyne court relied on statements in the legislative history that indicate congressional intent to rely on common law principles to determine whether joint and several liability should be applied. 572 F. Supp. at 806-807 (quoting Senator Randolf “we have deleted any reference to joint and several liability, relying on common law principles” and Representative Florio “Issues of joint and several liability resolved shall be governed by common law.”)

247 Among the early Superfund decisions that analyze the meaning of the statute’s failure to address whether liability in joint and several are: Chem-Dyne, 572 F. Supp. at 806; Colorado v. ASARCO, Inc., 608 F. Supp 1484 (D. Colo. 1985); United States v. Argent Corp., 21 Env. Cases (BNA) 1356 (D.N.M. 1984). One commentator summed up a section on joint and several liability by stating “in a very short period of time, so many courts had adopted the Chem-Dyne position (holding that Superfund defendants are jointly and severally liable) that there was no longer a reasonable basis for disagreement concerning the application of joint and several liability.” A. Topol and R. Snow, Superfund Law and Procedure § 54.4 at 372 (West 1992), citing United State v. Conservation Chemical, 1984 HWR 6065 (W.D. Mo. 1984), which cited five other federal decisions for the proposition that there was no ground for difference of opinion on the issue.

248 See, e.g. the cases cited in footnote 241.
Similarly, parties who sent waste to a landfill that is a Superfund site and the
remedy is to simply place a cap over the contamination, may be another example of where the
resulting problem is not caused by interaction. In that case, there are so many contributors that
none is necessary to the result. Does the Atlantic Research decision, by questioning the
applicability of joint and several liability, open the door to more divisibility claims?

Superfund defendants often raise the issue of divisibility, but courts have found
Superfund liability to be divisible only in very limited circumstances. An example is In re Bell
Petroleum, where a single environmental harm was caused by operators of the same plating
facility, each of whom operated the facility each for a different number of years. The court
found that they were not joint tortfeasors because there was a means of dividing the results of
their actions, and held that each should be liable for a portion of the costs based on the number of
years they operated the facility.

The Atlantic Research Court’s reasoning which, as discussed above, suggests that a PRP
plaintiff and other PRPs are not joint tortfeasors, suggests a broader role for divisibility. The
Court stated that “contribution . . . is contingent upon an inequitable distribution of common
liability among liable parties. By contrast, § 107(a) permits recovery of cleanup costs but does
not create a right of contribution. A private party may recover under § 107(a) without any
establishment of liability to a third party.” If PRPs are not necessarily joint tortfeasors; that is,
they do not have common liability, then what is the basis for joint and several liability?

Certainly, the PRP plaintiff will not be jointly and severally liable on the contribution
counterclaim. However, if the contribution of two PRPs who sent waste to the site is divisible
based on one being a remediator and one being a reimburser, then other PRPs whose relationship

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to the contamination is categorically different may also be able to avoid joint and several
liability. The Atlantic Research Court’s reasoning thus suggests a broader use of divisibility.

D. Contribution Protection

The Atlantic Research Court noted that granting a PRP a § 107(a) claim may interfere
with the contribution protection provisions of CERCLA that are designed to encourage
settlement. The Court acknowledged the problem, but took the position that even if PRPs can be
§ 107(a) plaintiffs and can thus have a cause of action against those who settled (against those
who have contribution protection), the incentive to settle would not be undermined. In other
words, the Court concluded that some PRPs could have a cause of action against a PRP who has
contribution protection, but that is not a significant concern.

The Court must have known that some courts had used the CERCLA contribution
protection provision to defeat claims other than contribution claims. In United States v Canons
Engineering Corp., for example, the court dismissed common law indemnity claims because
they were seen as an attempt to “make an end around the statutory scheme.” The Court did not
express a concern about this and took the position that a § 107(a)(4)(B) claim would not be
prevented and would not be seen as an “end around.”

What About the Governmental Entity that Reimburses Another?

Is a government entity that reimburses another government entity for remediation costs
entitled to joint and several liability? This is, in a sense, the reverse of the overlap case the Court
was concerned with. The overlap case described by the Court was the person who performs
remediation as a result of litigation. This person is not a volunteer and therefore has a § 113
contribution claim, but has also performed remediation, and therefore should have a § 107 claim.

253 899 F.2d 79 (1st Cir. 1990).

254 Id. at 92.
The reverse case, the nonremediator who is a volunteer may not have a claim under either statute. He has clearly not “incurred” response costs to have a § 107 claim, but as a volunteer, he also does not have a contribution claim.

An example of such a case is Town of Windsor v Tesa Tuck, Inc. The Town of Windsor remediated a Superfund site and the State of New York reimbursed the Town for a portion of its costs pursuant the the New York State Environmental Quality Bond Act. The Town and the State brought a § 107(a) action against responsible parties and some of the parties moved to dismiss the State’s claim because the State, as a reimburer, did not incur response costs. The court concluded that costs of reimbursing the Town for its response costs were response costs.

Under Atlantic Research, that issue would be decided differently. The Atlantic Research Court concluded that only one who performs the remediation has “incurred” response costs. The State did not perform remediation and therefore should not be able to bring a § 107(a) claim.

IV. Conclusion

The Supreme Court began reexamining who may be a Superfund plaintiff in Aviall, holding that a PRP who voluntarily performs remediation does not have a § 113 claim for contribution against the person who caused the contamination. The Court left open the possibility that such a person may have a § 107 claim.

The limitation on who could bring a § 113 claim caused a reexamination of who may bring a § 107 claim, resulting in the Atlantic Research decision, which held that a volunteer who remediated the site could be a § 107 plaintiff. In order to explain how the two sections fit together, the Court addressed the different roles the two sections play in the statutory scheme.

The result is that, now, a potentially responsible party who Remediates a site and thereby incurs

response costs has rights that are substantially different from the potentially responsible party who merely reimburses someone else for response costs. This result raises a question about whether such a party would be subject to joint and several liability and this article explained how the Court’s reasoning could lead to a reassessment of joint and several liability in Superfund litigation.

The Court also acknowledged and left open the question of whether the nonvolunteer who remediates should be treated like a volunteer who remediates. This article has concluded that the two should be treated the same with respect to having a § 107(a)(4)(B) claim. Additionally, this article suggested a procedure for dealing with the complicated cases in which a PRP who is a § 107(a)(4)(B) plaintiff is entitled to joint and several liability and faces contribution counterclaims.
plaintiff could collect its and the court addressed three types of fees: (i) those incurred in negotiating with EPA, (ii) those incurred identifying other PRPs and (iii) those incurred litigating against other PRPs. While the issue before the court was which of these fees was taken a broad view of contribution, concluding that at common law, any suit between joint tortfeasors was a contribution claim. Such courts viewed all PRPs as joint tortfeasors and therefore held that the implied §107 claim was a contribution claim. Others viewed contribution more narrowly, as a claim that arises only when one joint tortfeasor pays more than its fair share of the joint liability. To such courts, the implied claim was for
cost recovery pursuant to §107, which was a distinct claim from contribution pursuant to §113.

If the two subsections permit recovery of essentially the same thing, then why should there be two subsections?

The Con Ed court read the section similarly – § 107(a)(4)(B) applies only to those who “incurred response costs,” not those who reimburse others. The Con Ed court, however, had a slightly different emphasis and this difference goes to the heart of understanding the difference between the § 107(a)(4)(B) plaintiff and the person who
merely reimbursed others. According to the Con Ed court, the difference between the remediator and the reimburser is whether what they incurred was “response costs,” while the Atlantic Research Court concluded that the difference is who has “incurred” the response costs. The position taken by the Atlantic Research Court maintains the broad definition of “response costs” used by prior courts and thus, maintains an expansive reading of what the section 107(a)(4)(B) plaintiff may recover once we decide who may be a section 107(a)(4)(B) plaintiff.

The difference between Con Ed and Atlantic Research in this regard is subtle. If asked who may recover under section 107(a)(4)(B) and what costs may they recover, the Con Ed court would answer (i) “any other party” but (ii) only for response costs (which excludes reimbursement costs). On the other hand, the Atlantic Research Court would answer the same questions: (i) only persons who incurred response costs (which excludes persons who reimbursed someone who incurred response costs) and (ii) they can recover response costs (which term retains its original meaning).

The Atlantic Research Court’s reading of the statute remains closer to the text of § 107(a)(4)(B), fits in better with the other parts of CERCLA and helps explain how the Court would respond when faced with the overlap case that it did not decide.